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United States
COURT OF APPEALS
for the Ninth Circuit

Switchmen's Union of North America, General Adjustment Committee — Southern Pacific Company, Switchmen's Union of North America; Neil T. Speirs, as International Vice President, Switchmen's Union of North America, and John R. Burge, as General Chairman and as Acting General Chairman, Switchmen's Union of North America,

Appellants,

-vs-

Southern Pacific Company, a Corporation, and Brotherhood of Railroad Trainmen, et al.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division

BRIEF OF APPELLANTS, SWITCHMEN'S UNION OF NORTH AMERICA, ET AL.

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BRIEF OF APPELLANTS, SWITCHMEN'S UNION OF NORTH AMERICA, ET AL.

JURISDICTION

DISTRICT COURT

The jurisdiction of the district court in this case rests upon 28 U.S.C. 1332, 1337, 2201. The plaintiff, Southern Pacific Company, hereinafter called the carrier, is a corporation organized and existing under the laws of the State of Delaware (Tr 4, 42). The defendants are all residents and citizens of states other than Delaware (Tr. 4-5, 43). The amount in controversy,

exclusive of interests and costs, exceeds $3,000.00. The case therefore is within the jurisdiction of the district court as a case involving diversity of citizenship and the requisite jurisdictional amount, 28 U.S.C. 1332 (Tr 43).

As alleged in the complaint (Tr 6-8) filed herein by the carrier, admitted in the answer (Tr 24-25) filed by the defendant Brotherhood of Railroad Trainmen, hereinafter called the B.R.T., further amplified by the answer and counterclaim (Tr 19-22) filed by the defendant counterclaimant Switchmen's Union of North America, AFL-CIO, hereinafter called the S.U.N.A., and found by the court (Tr 42-45), the parties were engaged in a controversy as to the validity under the Railway Labor Act, as amended, 45 U.S.C. 151 *et seq.*, of provisions in two collective bargaining agreements entered into between the carrier and the B.R.T. which provided for the checking off of dues in favor of the B.R.T. from wages of yardmen employed in a class or craft for which the S.U.N.A. had been certified by the National Mediation Board as the exclusive bargaining representative. Since the Railway Labor As is an Act of Congress regulating commerce, the action is within the jurisdiction of the district court as a suit arising under an Act of Commerce regulating commerce within the meaning of 28 U.S.C. 1337 (Tr 43)[1].

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[1] *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,* 1944, 323 U.S. 210, 213; *Primakow v. Railway Express Agency,* D.C. Wis., 1941, 57 F. Supp. 933, 934; *Air Line Dispatchers Ass'n. v. National Mediation Board,* App D.C., 1951, 189 F. 2d 685, 689, certiorari denied, 342 U.S. 849.

The existence of an actual controversy among the parties with respect to the validity under the Railway Labor Act of the carrier's conduct in checking off dues in favor of the B.R.T. from the wages of persons represented by the S.U.N.A. conferred jurisdiction on the district court to declare the rights of the parties under the Federal Declaratory Judgment Act, 28 U.S.C. 2201 (Tr 43)[2].

COURT OF APPEALS

The United States District Court for the Northern District of California, Southern Division, on March 29, 1956, entered its judgment in favor of the carrier and the B.R.T. and against the S.U.N.A., declaring that "the 'Dues Deduction Agreements', subject of this action, are wholly valid and enforceable and in accordance with the terms of the Railway Labor Act" (Tr 46-47). The S.U.N.A. filed its notice of appeal on April 16, 1956 (Tr 48). This court has jurisdiction of this appeal by virtue of 28 U.S.C. 1291.

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[2] *American Federation of Labor v. Western Union Telegraph Co.*, 6 Cir., 1950, 179 F. 2d 535, 538; *Panhandle Eastern Pipe Line Co. v. Michigan Consol. Gas Co.*, 6 Cir., 1949, 177 F. 2d 942, 944; *Consolidated Gas Utilities Corp. v. Keener Oil & Gas Co.*, D.C. Okla., 1950, 94 F. Supp. 689, 693, affirmed, 10 Cir., 1951, 190 F. 2d 985, 989.

STATEMENT OF THE CASE

The S.U.N.A. has at all times material hereto been the exclusive collective bargaining representative of the craft or class of yardmen employed by the carrier. The status of S.U.N.A. as such representative had been established by certificates issued in November, 1950, and again on October 18, 1954, by the National Mediation Board acting pursuant to the provisions of Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. 152, Ninth. In both instances the certificates were issued as a result of elections conducted by the National Mediation Board in which the majority of the employees in the craft or class of yardmen voted to select the S.U.N.A. as the exclusive collective bargaining representative for their craft or class (Tr 4, 17, 27).

Despite the foregoing certification of the S.U.N.A., the carrieer, on June 23, 1955, entered into two collective bargaining agreements with the B.R.T. which provided that the carrier would check off and pay over to the B.R.T. "periodic dues, initiation fees, assessments and insurance" from wages of all members of the B.R.T. employed by the carrier "in any of the services or capacities covered in Section (3) First (h) of the Railway Labor Act defining the jurisdictional scope of the First Division, National Railroad Adjustment Board, upon the written and unrevoked authorization of a member" (Tr 6-7, 9-13, 16, 24, 43-44). The section of the Railway Labor Act to which the agreements refer for a description of the classes or crafts covered, namely, Sec-

tion 3, First (h), 45 U.S.C. 153, First (h), confers on the First Division of the National Railroad Adjustment Board jurisdiction over yardmen, the same craft or class for which S.U.N.A. has been certified as the exclusive collective bargaining representative. The pertinent language of Section 3, First (h) of the Railway Labor Act is as follows:

> "First division: To have jurisdiction over disputes involving train—and yard—service employees of carriers; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen, and yard-service employees."

The carrier and the B.R.T. have construed and applied their above described check-off agreements of June 23, 1955, to the craft or class of yardmen employed by the carrier for whom the S.U.N.A. is the exclusive collecting bargaining representative (Tr 7-8, 16, 20, 26, 27, 36). At all times since the effective date of those agreements the carrier has checked off and paid over to the B.R.T. the dues, initiation fees, assessments and insurance of such of the yardmen as joined or were members of the B.R.T. and authorized such check off (Tr 7-8, 16, 20, 26, 27, 36).

On September 8, 1955, the S.U.N.A. by letter, and on September 28, 1955, officers of the S.U.N.A. in conference with the officials of the carrier, informed the carrier that the S.U.N.A. believed that the above check-off agreements violated Section 2, Fourth of the Railway Labor Act, as amended, insofar as they were applicable to yardmen (Tr 7-8, 16, 21-22, 26, 27, 44). The S.U.N.A. requested the carrier to cease giving ef-

fect to the agreements insofar as they applied to yardmen (Tr 7-8, 16, 21-22, 26, 27, 44). The carrier refused so to do (Tr 8, 16, 22, 26, 27).

In order to resolve the controversy between the carrier, the B.R.T. and the S.U.N.A. with respect to the validity of the above dues check-off agreements between the carrier and the B.R.T. insofar as they applied to yardmen, the carrier filed this suit for declaratory relief (Tr 3-15). Both the B.R.T. and the S.U.N.A. by answer admitted the essential allegations of the complaint (Tr 16-17, 26).

The S.U.N.A. also filed a counterclaim asserting that the above described check-off agreements violate Section 2, Fourth of the Railway Labor Act, as amended, and injure the S.U.N.A. in three respects: (1) by depriving S.U.N.A. of its status as the exclusive collective bargaining representative of all yardmen employed by the carrier; (2) by depriving S.U.N.A. of initiation fees, dues, assessments and insurance of yardmen who are willing and anxious to join the S.U.N.A. but are unwilling to assume the burdens of paying such sums to each of two labor organizations; and (3) by creating division and dissension in the ranks of the craft or class of yardmen for which the S.U.N.A. is the exclusive collective bargaining representative (Tr 17-22). The S.U.N.A. alleged that it has no adequate remedy at law and will suffer irreparable injury unless the courts declare the dues check-off agreements between the carrier and the B.R.T., insofar as they apply to yardmen, to be in violation of Section 2, Fourth of the

Railway Labor Act, as amended, and enjoin the carrier and the B.R.T. from giving any further effect to such agreements insofar as they apply to yardmen or otherwise deducting any sums from the wages of yardmen to be paid over to the B.R.T. (Tr 22). The S.U.N.A. accordingly prayed for such a declaration of rights and injunctive relief (Tr 23).

There being no disputed facts, the carrier, the B.R.T. and the S.U.N.A. all moved for a summary judgment (Tr 29-34). The court at the arguments on the motions for summary judgment, received the evidence of one witness for the B.R.T. (Tr 86-113) and of one witness for the S.U.N.A. (Tr 114-119) both of whom corroborated and amplified upon the allegations in the pleadings. Thereafter, on March 5, 1956, the district court handed down an opinion (Tr 34-42) and on March 29, 1956, entered findings of fact, conclusions of law and judgment declaring the check-off agreements valid (Tr 42-47).

QUESTION INVOLVED

The only question involved in this appeal and the manner in which it is raised are as follows:

Whether under the Railway Labor Act, as amended (45 U.S.C. 151, et seq.), in a situation where the majority of the employees in a craft or class of operating employees have selected a union and the National Mediation Board has certified that union as the exclusive representative of the craft or class, the carrier may validly enter into a collective bargaining agreement with

one or more other unions to check off from their wages and pay over to such other union or unions dues of such of its employees within the craft or class as are members of such other union or unions.

This question is raised by the complaint for declaratory relief (Tr 3-13), the answers thereto (Tr 16-17, 26), the counterclaim filed by the S.U.N.A. (Tr 17-23), the opinion of the court below (Tr 34-42), and the judgment declaring such dues check-off agreements to be valid (Tr 46).

SPECIFICATION OF ERRORS

1. The court below erred in construing Section 2, Eleventh, of the Railway Labor Act, as amended (45 U.S.C. 152 Eleventh) as excepting from Section 2, Fourth, of said Act, dues check-off agreements made with labor organizations other than the one selected by the majority of the employees in the craft or class affected.

2. The court below erred in construing the Railway Labor Act, as amended (45 U.S.C. 151, *et seq.*) as permitting a carrier to contract with a minority union for a checking off of dues from the wages of employees for whom a majority union has been certified by the National Mediation Board as their exclusive bargaining representative.

3. The court below erred in declaring the dues check-off agreements between the carrier and the B.R.T. to be valid, enforceable and in accordance with the terms of the Railway Labor Act.

SUMMARY OF ARGUMENT

The Railway Labor Act, as amended, contains an express and unambiguous ban on all checking off of dues except to the union which has been chosen by the majority of the employess in the craft or class involved as the exclusive representative of that craft or class. Section 2, Fourth, read alone, prohibits all deductions of dues from wages. Section 2, Eleventh, modifies this prohibition to the extent of permitting a valid agreement between a carrier and the labor organization, chosen as the representative of the craft or class, for a dues check off to that labor organization. Since the modification is limited to an agreement with the majority union for a check off in favor of the majority union, all agreements with minority unions and all checking off to minority unions remain prohibited.

The legislative history of the Railway Labor Act shows that the B.R.T. made an unsuccessful effort in Congress to secure the repeal of Section 2, Fourth, at the time Section 2, Eleventh was enacted. The rejection by Congress of the B.R.T.'s proposal to repeal the ban on check offs and its adoption instead of a modification permitting check offs to majority unions only shows clearly that Congress intended that all agreements permitting a checking off to any union other than that chosen by the majority of the employees, should continue to be illegal.

This construction of Section 2, Eleventh of the Railway Labor Act is in accord with the holdings by the Supreme Court of the United States that the Act bars all agreements between carriers and minority unions after a majority union has been chosen.

Strong considerations of practical labor relations support the ban on check-off agreements with minority unions. The status as exclusive collective bargaining representative of the union chosen by the majority of employees in a craft or class is undermined if a carrier may enter into agreements with one or more minority unions applicable to persons within the craft or class. Employers can never rest assured that any collective bargaining agreement fixing terms and conditions for a period of time will give them a period of stability, if at any time one or more new unions may open negotiations for agreements with them applicable to members of the group already covered. Division and dissension within the ranks of the craft or class are given encouragement if minority union check-off agreements are valid. Finally, the financial stability of the bargaining agent for the group, which Congress found a sound basis for permitting check offs to the bargaining agent, is lessened to the extent that members of the craft or class may bind themselves, either before or after entering the craft or class, to dues check-off authorizations to other unions irrevocable for a year.

ARGUMENT

I

The express language of the Railway Labor Act prohibits all checking off of dues except when checked off to the exclusive representative of the class or craft.

Section 2, Fourth, of the Railway Labor Act contains an absolute ban on all checking off from wages of employees of dues. This section is modified by Section 2, Eleventh, to the extent of permitting a checking off of dues in only one instance: where dues are checked off to the union which is the representative of the class or craft. Only the union chosen by a majority of the employees can be the representative of the craft or class. A minority union can never be. Hence, a check off to a minority union is not within the check off permissible under Section 2, Eleventh, and remains illegal under Section 2, Fourth.

Section 2, Fourth, of the Railway Labor Act, as amended, (45 U.S.C. 152, Fourth), insofar as it deals with a check off of dues,[3] provides:

> "it shall be unlawful for any carrier * * * to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations."

[3]The full provisions of Section 2, Fourth, Fifth, Ninth and Eleventh are printed in an Appendix at the end of this brief, pp 35-39, *infra*.

Section 2, Eleventh, of the Railway Labor Act, as amended, (45 U.S.C. 152, Eleventh), excepts certain check-off agreements from the above ban. In this regard the section reads:

> "Notwithstanding any other provision of this chapter * * * any carrier or carriers as defined in this chapter and *a labor organization or labor organizations duly designated and authorized to represent employees* in accordance with the requirements of this chapter shall be permitted
>
> * * * *
>
> "(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and *payment to the labor organization representing the craft or class of such employees,* of any periodic dues, initiation fees, and assessments
>
> * * * *
>
> "(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended." (Emphasis supplied.)

The above quoted provisions of the Railway Labor Act are clear and unambiguous. All check-off agreements and all checking off whether pursuant to the agreement or otherwise are illegal except where the agreement providing for the check off is made with a labor organization "duly designated and authorized to represent employees in accordance with the requirements" of the Railway Labor Act and provides for the payment "to the labor organization representing the craft or class of such employees." Other provisions of the Railway Labor Act show that only a labor organization selected

by a majority of the employees in the craft or class is "duly designated and authorized to represent employees in accordance with the requirements of the Act" and that only such a labor organization meets the specifications of one "representing the craft or class of such employees".

Thus, Section 2, Fourth, of the Railway Labor Act, as amended (45 U.S.C. 152, Fourth), along with its ban on all check offs, also provides:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

Section 2, Ninth (45 U.S.C. 152, Ninth) provides:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated or authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter."

From this it follows that both the introductory sentence of Section 2, Eleventh, defining the labor organization with which a check-off agreement may validly be made and subparagraph (b) of Section 2, Elev-

enth, defining the labor organization to which checked-off dues may validly be paid, limit the permissible labor organization to one representing the craft or class.

In the instant case, the S.U.N.A. had been chosen by a majority of the employees in the only craft or class involved, namely, the yardmen employed by the carrier, and had been certified by the National Mediation Board as the representative of that craft or class, duly designated and authorized in accordance with the requirements of the Railway Labor Act (Tr 4, 17, 27). Hence, the S.U.N.A. is the exclusive representative of the craft or class of yardmen employed by the carrier. By reason of the permissive language of Section 2, Eleventh, a check-off agreement between S.U.N.A. and the carrier applicable to yardmen and providing for payment of the checked-off dues to the S.U.N.A. could validly be made. All other check-off agreements remain illegal under Section 2, Fourth. The B.R.T. has no status, and claims none, as the representative of the craft or class of yardmen employed by the carrier. The agreement between the B.R.T. and the carrier insofar as it is applicable to the craft or class of yardmen violates the express language of Section 2, Fourth, and does not fall within the exceptions of Section 2, Eleventh.

No other provision of the Railway Labor Act affords any basis for reading into the absolute ban imposed on check offs by Section 2, Fourth, any exceptions other than the one expressly set forth in Section 2, Eleventh. The court below apparently based its decision (Tr 34-42) on two features of the Railway Labor

Act both found in Section 2, Eleventh (c). The first provision in subparagraph (c) upon which the court below relied is by its terms concerned only with union security agreements and not with check-off agreements. The court below however, reasoned that by analogy a similar provision respecting check-off agreements should be implied. This, we submit, is clearly negatived by the fact that subparagraph (c) expressly deals with the parallel problem with respect to check offs but not by making the provision which the court below implied. As we shall explain more fully in the next point, the legislative history of subsection (c) compels exactly the opposite conclusion from that drawn by the court below.

Subparagraph (c) of Section 2, Eleventh, with respect to check-off agreements, contains only one express provision, which reads as follows:

> "no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages of periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership."

The court below read this language as authorizing a check-off agreement to any organization in which an employee held membership (Tr 41-42). Such a construction conflicts with the earlier provisions in the section carefully limiting check-off agreements to the bargaining representative of the craft or class and further carefully limiting payments of checked-off dues to such representative of the craft or class. This language in subparagraph (c) means just what it says and no

more; even with respect to agreements for check off with the representative of the craft or class of dues there must be no checking off of dues of any employee in the craft or class who is not a member of the labor organization which is the representative of the craft or class.

No basis exists for going further and saying that whatever labor organization he does belong to may have a check off. To so read the Act is to render completely meaningless the careful limitations spelled out in the introductory sentence to Section 2, Eleventh, and in subparagraph (b) of that section. It likewise renders completely meaningless the retention in the Act of the language of Section 2, Fourth, banning check offs. If Congress had wished to allow dues to be checked off to any labor organization in which an employee held membership it would have repealed the prohibition on such check offs contained in Section 2, Fourth. As we shall show in our subsequent discussion of the legislative history, the B.R.T. proposed to Congress such a repeal but Congress instead retained the ban as fully applicable to all checking off of dues except to the majority union.

With reference to union security agreements, subparagraph (c) of Section 2, Eleventh, does not change the limitation imposed by the introductory sentence of Section 2, Eleventh, that both union security agreements and check-off agreements may be made only with the majority union. It does, however, without permitting the carrier to enter into any agreements with

minority unions, prevent any operating employee of a carrier from being discharged for non-membership in the majority union so long as he shall "hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership" operating employees. This court will recall that it recently had before it a case arising out of this language, but not presenting any issue with respect to the check off. *United Railroad Operating Crafts v. Northern Pacific Ry. Co.,* 208 F. 2d 135, certiorari denied, 347 U.S. 929, Cf. *Pigott v. Detroit, Toledo & Ironton Ry. Co.,* 116 F. Supp. 949, affirmed CA 6, 1955, 221 F. 2d 736, certiorari denied, 350 U.S. 833, and cases cited in those opinions.

There is nothing in the union security provision of the Railway Labor Act, as amended, which either expressly or by implication suggests that each national labor organization may make check-off agreements applicable to any craft or class in which any of its members may be employed. Members of minority unions may hold and retain their membership in minority unions by voluntarily paying dues to such minority unions. There is no reason that minority unions should in addition have the right to a check off.

Minority unions are expressly protected against having their members' dues checked off to the majority union when they are not members of it. This express provision dealing with the check-off problem in this context discloses the Congressional intent to make only this provision respecting the check-off problem as applied to members of minority unions.

It negatives any intention to go further and imply, as the court below did (Tr 39-42), that since employees could remain members of a minority union so long as it was national in scope, without the necessity of joining the majority union to retain their jobs, they could also have their dues checked off to a minority union. Not only does the very different provision defining their protection from a check off to the majority union negative any implication that they were to have even greater check off rights in derogation of the majority union, but the express ban on all check offs which was retained in Section 2, Fourth, and limited only by the permissive language of Section 2, Eleventh (b) where the check off is to a majority union, would be completely inconsistent with such an implication. The decision of the court below flies squarely in the face of the express ban of Section 2, Fourth. If the court below is correct, the ban on check offs contained in Section 2, Fourth, is read out of the Act.

While the court below does not appear in its opinion to have relied upon the fact that the dues check-off agreements between the S.U.N.A. and the carrier could be read as providing for a dues check off of members of S.U.N.A. who are employed in a craft or class of trainmen or brakemen for which the B.R.T. is the majority union, the court below does mention this feature of the S.U.N.A.'s agreements, both in its opinion (Tr 36) and in its findings of fact (Tr 44). The evidence discloses that when the S.U.N.A. proposed a check-off agreement to the carrier, the carrier suggested the use of the same

form of agreement already in existence between the carrier and the B.R.T. (Tr 99-100; 115). The S.U.N.A. acquiesced without realizing the effect and meaning of the disputed provision (Tr 115-116). Its agreement has never been applied to checking off of any dues other than in the craft or class of yardmen for which the S.U.N.A. is the majority union (Tr 116). As soon as S.U.N.A. realized the effect of this provision it offered to abrogate it and has informed the carrier that S.U.N.A. regards it as illegal and wishes to repudiate and set it aside (Tr 52, 57, 116). In these circumstances the presence of the identical provision in the S.U.N.A. agreements can afford no basis for construing the Railway Labor Act as permitting check-off agreements with a minority union.

II

The legislative history of Section 2, Eleventh of the Railway Labor Act shows that Congress considered and rejected proposals which would have permitted checking off of dues to unions other than the exclusive representative of the craft or class.

Section 2, Fourth of the Railway Labor Act, as amended in 1934, prohibited all checking off of dues to any labor organization. Its language so indicates (see p. 11, *supra*) and it has so been construed in the only case in which the issue arose. *Association of Rock Island Mechanical and Power Plant Employees v. Lowden,* D.C. Kan., 1936, 15 F. Supp. 176, affirmed, *Brotherhood of Railroad Shop Crafts of America v. Lowden,*

86 F. 2d 458, 108 A.L.R. 1128, certiorari denied, 300 U.S. 659.

In 1951, Congress adopted Section 2, Eleventh, which expressly modifies Section 2, Fourth, to permit checking off of dues to the extent set forth. During the hearings before Congressional committees which preceded the enactment in 1951 of Section 2, Eleventh of the Railway Labor Act, as amended, the Brotherhood of Railroad Trainmen, the same organization whose agreement with the carrier is under attack in this suit, urged upon Congress both the complete repeal of the ban on check-off agreements contained in Section 2, Fourth, and also the inclusion of express provisions permitting a check off to a minority union under such circumstances as are present in the instant case.

The bills upon which the hearings were held in Congress preceding the enactment of Section 2, Eleventh, were S. 3295, 81st Cong., 2nd Sess. and H.R. 7789, 81st Cong., 2nd Sess. As introduced in Congress these bills contained provisions similar to those ultimately enacted in that they each limited the labor organization with which a check-off agreement could validly be made and to which checked-off dues could validly be paid by a carrier, to the labor organization representing the craft or class.[4] The B.R.T. appeared by its legislative

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[4]S. 3295, as introduced, is printed in Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295, p. 1, H.R. 7789 is printed in Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H.R. 7789, p. 1.

representative, Mr. Harry See, at the hearings held before the Senate and the House Committees considering the bills and opposed the enactment of the bills as introduced on various grounds, one of which was that the provisions proposed would, if enacted, prevent the checking off of dues to the B.R.T. in instances where it was not the representative of the craft or class in which some of its members were employed. Mr. See even mentioned by name the S.U.N.A. as a union which sometimes represented the craft or class in which members of the B.R.T. were employed and urged that provisions permitting a check off to the B.R.T. in such circumstances should be adopted in lieu of the proposed bills. In this respect, Mr. See said:[5]

> "The check-off provisions of Senate 3295 are found in subparagraph (b) thereof. The Brotherhood of Railroad Trainmen objects to this proposal for the reason that it is wholly lacking in that same flexibility which is essential in its application to the craft situation which exists among railroad operating groups of employees. Furthermore, it leaves in the Railway Labor Act language specifically forbidding the check-off of union dues.
>
> "Furthermore, the Brotherhood of Railroad Trainmen believes that where two or more crafts are closely related and the same employees hold employment rights in more than one of them that the individual should have the right to authorize the carrier to check off his dues in favor of the organization of his choice so long as that organization is the duly recognized and authorized representative of one of said railroad crafts; and that therefore the check-off should be predicated upon individual authorizations by the employee.
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[5]Senate Hearings, *op. cit.*, pp. 69-70, 73; cf. House Hearings, *op. cit.*, pp. 33-34.

"If our proposal to amend the Railway Labor Act to permit the union shops should be adopted we will find members of the Order of Railway Conductors, or members of the Switchmen's Union, that would be employed under the Brotherhood of Railroad Trainmen agreements on the railroad, the conductors would have the contract for the conductors, and our organization would have the contracts for brakemen. A man might be promoted and be running a train maybe 3 or 4 months of the year, and the other 7 or 8 months of the year working as a brakeman, and if he would be required to pay dues into the union during the 2 or 3 months, or maybe 2 or 3 weeks out of the year that he was employed as a conductor, it would be unfair to him and to us.

"The same thing would be true if he had joined the conductors because he was working part-time as a conductor, and came back to work as a brakeman and he was required to pay dues into the trainmen, even though he held membership in the conductors. It would be unfair to him and to the conductors."

The above arguments of the B.R.T. appear in essence to be directed against employees facing a situation of relinquishing membership in the union of their choice or paying dues to two unions. The only unfairness cited is the payment of dues to two unions. Congress remedied this by providing in subparagraph (c) of Section 2, Eleventh, that dues could not be checked off except to the organization in which the employee held membership. However, Mr. See's proposals went further. On behalf of the B.R.T. he demanded a complete repeal of the ban on checking off of dues contained in Section 2, Fourth. Senate Hearings, *op cit.,* pp. 69-70; House Hearings, *op. cit.,* pp. 32-33. The other unions

favored retaining the prohibition of Section 2, Fourth. Mr. George M. Harrison, President of the Brotherhood of Railway and Steamship Clerks, A.F.L., who testified as the representative of the Railway Labor Executives Association, composed of 21 standard railway labor organizations supporting the bills, explained why Section 2, Fourth, should be retained, as follows (House Hearings, *op. cit.*, p. 248):

> "The bill before you modifies the present language only to the extent that the union shop and deduction of dues may be negotiated solely by agreement between the carrier and the designated collective bargaining representative of a class or craft. *The carrier would still be barred from deducting dues* or entering into a union shop agreement *with* an individual, *minority group,* or union which does not hold the collective bargaining agreement. That is why we want to leave paragraphs fourth and fifth of section 2 in there and stop that kind of action as the present law does. At the same time we want to make it possible for the designated agents of the bargaining union and the employer to make a satisfactory agreement." (Emphasis supplied.)

Senator Hill, who was in charge of the bill in the Senate, introduced into the debates in Congress a similar explanation by Mr. Harrison of the reasons for retaining the ban on check offs contained in Section 2, Fourth. Mr. Harrison's explanation as it appears in the Congressional Record (96 Cong. Rec. 16264) reads as follows:

> "The bill before you modifies the present language only to the extent that the union shop and deduction of dues may be negotiated solely by agree-

> ment between the carrier and the designated collective-bargaining representative of a craft or class. *The carrier would still be barred from deducting dues* or entering into a union-shop agreement *with any* individual, *minority union,* or union which does not hold a collective bargaining agreement." (Emphasis supplied.)

The court below ignored both the plain language of the Act and this legislative history when it held that since the abuse which had given rise to the ban of check offs in 1934, namely check offs to company dominated unions, no longer existed, any check off to a union in which an employee held membership, even though a minority union, was valid (Tr 41-42). This legislative history on the contrary shows that the ban on all check offs except to a majority union was expressly retained in order that check offs to minority unions would remain illegal.

In addition to urging the outright repeal of all language in the Railway Labor Act which prohibited check offs, the B.R.T. also proposed to each the Senate and the House Committee an amendment which would specifiically permit a check off to a minority union where its members were sometimes employed in a craft or class for which it was a majority union and by reason of such employment had rights to employment in another craft or class for which their union was not the majority choice. The B.R.T.'s proposed amendment read as follows:[6]

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[6]Senate Hearings, *op. cit.*, p. 69; House Hearings, *op. cit.*, pp. 32-33.

"Notwithstanding any other provision of law any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act may make agreements providing, upon individual authorizations, for the deduction from the wages of its or their employees in a craft or class to whom membership is available upon the same terms and conditions as are generally applicable to any other member and pay to the labor organization representing such craft or class of such employees, any dues, fees, assessments, insurance premiums or contributions which may be payable to such labor organization, *provided that when two or more such crafts or classes are closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee or promotions from one of such crafts or classes to another are had all such sums shall be deducted and paid over which are payable to the organization of the employee's choice, which is the duly designated and authorized representative of any of such crafts or classes.*" (Emphasis supplied.)

Mr. Harrison, speaking on behalf of the proponents of the bills as introduced, stated that they intended all checking off of dues to the majority union representing the craft or class to cease when an employee was promoted out of that class or craft. Thus Mr. Harrison stated (House Hearings, *op. cit.*, pp 250, 251; Senate Hearings, pp 40, 41):

"It has also been prophesied that great difficulties will arise in the promotion of men who belong to a union and who are paying dues by means of a check-off. If a man is promoted to another craft, his dues would then, under the provisions of this bill, be paid to the organization representing that craft. * * *

> "The further argument that the promotion of men would be handicapped by the check-off is equally lacking in validity. When an employee is promoted to an official position and out of a class or craft represented by a labor organization, the deduction of his dues under the provisions of this bill would necessarily cease."

Congress did not adopt either the amendment proposed by the B.R.T. or the bills originally sponsored by Mr. Harrison on behalf of the Railway Labor Executives Association. As we have already pointed out, subparagraph (c) of Section 2, Eleventh, as enacted, prevents any employee from having his dues checked off to any union in which he does not hold membership. As a further protection to employees, the Congress likewise inserted a provision in Section 2, Eleventh (b), which limits the check off to employees who have in writing authorized their dues to be checked off. Such written authorizations are expressly made by the statute revocable after one year. It is thus apparent that Congress adopted a compromise position.

Congress did not go as far as the original bills sponsored by Mr. Harrison appearing on behalf of the Railway Labor Executives Association which would have allowed the majority union to have dues of every employee in the craft or class checked off to it, irrespective of the employee's membership in that organization or wishes, whether a member or not. Nor did Congress go as far to the other direction as Mr. See, appearing in behalf of the B.R.T., who would have allowed minority unions to have their members' dues checked off

from wages earned by their members when employed in a craft or class of which another union was the majority choice. Instead Congress limited a check off to members of the majority union when working in the craft or class represented by their union and even then only when such members gave their written consent to the check off and the employer and majority union had entered into a collective bargaining agreement providing for such check off. Congress thus left employees free to remain members of a union other than the majority choice but made their continued payment of dues in any minority union dependent upon their voluntary act of paying.

The objective of Section 2, Eleventh, as repeatedly expressed in the Congressional hearings and debates preceding its enactment was to increase the financial stability of the union chosen by the majority and to reduce the dissension and unrest which results when a minority of the employees in the craft or class are not members of the union representing them. Mr. Harrison testified:[7]

> "All of our unions have what we call a certain number of 'no bills', nonmembers, free riders, and that is the group we are after here.
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> * * * *
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> "A no bill, in railroad terminology is applied to a shipment that is travelling without revenue, in other words, it is a free rider. * * *
>
> * * * *
>
> "Activities of labor organizations resulting in the procurement of employee benefits are costly, and

[7]Senate Hearings, *op. cit.*, pp. 6, 15-16.

> the only source of funds with which to carry on these activities is the dues received from members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits of these activities without contributing anything to the cost. * * *
>
> * * * *
>
> "It is axiomatic that union members resent having to work side by side with 'free riders' who are enjoying benefits procured by the money, time and effort of union employees, and who at the same time are apt to be critical of union policies."

To the same effect, see House Hearings, *op. cit.,* pp 10, 50; 96 Cong. Rec. 17051, 17057.

Similarly, see the following statement of Congressman Wolverton (96 Cong. Rec. 17050):

> "To me it seems simple justice to expect, and, if necessary, require all employees who stand to benefit from collective bargaining to belong to the union that acts for them, and in their behalf. Otherwise, employees who do not belong to the union share equally with those who do belong, the same benefits, and, without assuming any of the responsibilities incident to membership."

Congressman Linehan stated (96 Cong. Rec. 17058):

> "This bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the 'free riders' in their midst — the men who take the gains which unions win through long and costly struggles, but refuse to pay one penny toward the expense involved."

While Congress was willing to write certain exceptions into the requirement that every employee in the

craft or class must be a member of and pay dues to the majority union, it left these exceptions at a minimum. For the courts to go further and give minority unions such encouragement as a check off would be to ignore the scheme and purpose of Section 2, Eleventh. Few arrangements could be more conducive to dissension from the majority union than a valid check off to a minority union. In view of the literal language of the statute making such a check off illegal, coupled with the legislative history showing Congressional rejection of proposals to legalize check offs to a minority union, it must be held that the Railway Labor Act renders such check offs illegal.

III

The uniform judicial construction of the Railway Labor Act as forbidding carriers from treating with minority unions after a majority union has been established as the representative of a craft or class requires that the Act be construed as barring check-off agreements with minority unions.

It has been uniformly held that a carrier violates its duty to bargain collectively with the union chosen by a majority of the employees in a craft or class whenever the carrier enters into any agreement with a minority union with respect to employees working in the represented craft or class.

In *Virginian Ry. Co. v. System Federation* No. 40, 300 U.S. 515, 548, 549, the Supreme Court of the United States so held in affirming a decree which en-

joined the carrier from entering into any agreement with anyone other than the union selected by the majority of the employees in the craft or class. The Supreme Court stated:

> "The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees, as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through representatives of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. We think, as the Government concedes in its brief,[6] that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative.

The Supreme Court in other cases has commented that the Railway Labor Act prohibits bargaining with anyone other than the representative chosen by the majority. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44; *Medo Photo Supply Corp. v. N.L.R.B.*, 321

"[6](Note 35a). The Government interprets the negative obligations imposed by the statute and decree as having the following effect:

" 'When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a collective contract (i.e.), a contract which sets rates of pay, rules or working conditions), whether the contract covers the class as a whole or a part thereof."

U.S. 678, 683-684. Cf *Order of Railroad Telegraphers v. Ry. Express Agency,* 321 U.S. 342, 347; *J. I. Case v. N.L.R.B.,* 321 U.S. 332, 338-339.

The check off is an appropriate subject for collective bargaining. *N.L.R.B. v. Reed & Prince Mfg. Co.,* 1 Cir., 1953, 205 F 2d 131, 136. Hence agreements with respect to a check off are collective bargaining agreements and can only be made with the exclusive collective bargaining representative.

IV

Sound labor relations policy supports a construction of the Railway Labor Act which prevents check-off agreements with minority unions.

Not only the literal language of the Railway Labor Act and its legislative history support the view that check-off agreements with minority unions are prohibited in the railway industry but in addition numerous practical considerations require the same result.

Under the decision below there is no limit on the number of minority unions which may bargain with a carrier for check-off agreements applicable to their members. Since it has always been held that only the majority union could bargain with a carrier, we have no precedents to sanction strikes by a minority. But if collective bargaining between a carrier and a minority union over a check-off is legal, it might well follow that the minority union's members could strike in support of their union's demand. A strike threat by a majority union in support of a check off demand is legal. It was

threat of a strike for such a demand which preceded the creation of the President's Emergency Board No. 98 under Executive Order No. 10306, which, by its report of February 14, 1952 (N.M.B. Case No. A-3744), recommended to the 390 carriers there involved that they enter into check-off agreements of the type therein set forth (Report, pp 1-3, 52-56, 65-68, 69).

And even if a minority union could not properly strike for such a demand, carriers might be faced with all sorts of harassment if they resisted legal demands for a check off. Employers could never rest assured that any collective bargaining agreement fixing terms and conditions of employment for a period of time would give them a period of stability, if there is no limit on the right of minority unions to demand check-off agreements.

The status of the union selected by the majority of the employees would be seriously impaired by any construction of the Railway Labor Act which accords minority unions rights to bargain for a check off. No longer could it be truly regarded as the exclusive collective bargaining representative of the craft or class. Instead one or more other unions could at any time appear as a representative of their members to demand check-off privileges. To this extent the standing and prestige of the union chosen by the majority would be lessened.

Furthermore, competition over securing check-off authorization from employees could create division and dissension within the craft. Unrest and continual uncer-

tainty over the status of the majority union would result. A certification by the National Mediation Board would no longer serve as the only official count of employees supporting the majority union. From day to day unions could dispute each other's status on the basis of their comparative number of dues check-off authorizations.

The decision below also has the effect of permitting employees, even before they enter the craft or class, to bind themselves irrevocably for a year to have their dues checked off to another union. If after entering the new craft or class they are impressed with the ability and worthwhile character of the union representing them, they will be unable to contribute to its support until their previous check-off authorizations expire, unless they can afford to pay double dues. And employees within the craft or class, in a moment of disagreement with their bargaining representative, may commit themselves irrevocably for a year to have dues checked off to another union. Obviously, the financial stability of the official bargaining agent for the craft or class will be lessened to the extent that employees in that craft or class may bind themselves, either before or after entering the craft or class, to dues check-off authorizations to other unions, irrevocable for a year. But it was the financial stability of the majority union which Congress desired to encourage in the interests of stable and responsible labor-management relationships.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this court should reverse the judgment below and remand with directions to enter a judgment in favor of the defendants-counterclaimants, S.U.N.A. and its components and officers, and against the plaintiff-counterdefendant, Southern Pacific Company, and against the defendants-counterdefendants, B.R.T. and its components and officers, declaring and finding that the check-off agreements between the carrier and the B.R.T. to the extent that they are applicable to yardmen employees of the carrier are invalid and in violation of Section 2, Fourth, of the Railway Labor Act, as amended. The court below should also be directed to enter a decree permanently enjoining the carrier and the B.R.T. from applying any check-off agreement entered into between them to the yardmen employees and from doing any acts which would have the effect of deducting any sums from the wages of yardmen employees to be paid to the B.R.T. or any of its officers or components.

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APPENDIX

The pertinent provisions of the Railway Labor Act, as amended (Act of March 20, 1926, c. 347, 47 Stat 577; Act of June 21, 1934, c. 691, 48 Stat 1186; Act of Jan. 10, 1951, c. 1220, 64 Stat 1238, 45 U.S.C. 151 *et seq*) are as follows:

(These paragraphs are parts of 45 U.S.C. 152)

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from

permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth: No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of he Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate

method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as

are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition acquiring or retaining membershp.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold

or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238."